SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
JUL 11 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. 1771

AMERICAN CAN COMPANY, a New Jersey corporation,
Petitioner,

vs.

STATE OF NEW JERSEY, by HUGO A. HILGENDORFF, JR., Attorney-At-Law specially designated by the Attorney General of the State of New Jersey,
Respondent.

BRIEF AND APPENDIX FOR RESPONDENT, STATE OF NEW JERSEY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ARTHUR J. SILLS,
Attorney General of New Jersey,
Attorney for Respondent, State of New Jersey,
State House Annex,
Trenton 25, New Jersey.

CHARLES J. KEHOE,
Deputy Attorney General,
Counsel for Respondent, State of New Jersey.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statement of the Case	3
Summary of Argument	5
Argument:	
Point I—The Writ of Certiorari should be denied because the decision of the State Court was based upon general principles of res judicata which involve no substantial federal right or question	6
Point II—Petitioner has not been deprived of any federal constitutional right or due process of law	9
Conclusion	13
Appendix:	
Exhibit "A"	15
Exhibit "B"	16

Cases Cited

Baldwin v. Iowa State Traveling Men's Ass'n, 283 U. S. 522 (1931)	8, 10
Chicot Co. Drainage District v. Baxter State, 308 U. S. 371, rehearing denied, 309 U. S. 695 (1939)	8, 11
Chouteau v. Gibson, 111 U. S. 200 (1883)	7

PAGE

Commonwealth v. Western Union Tel. Co., 400 Pa. 337, 162 A. 2d 617 (1960) 4

Davis v. Davis, 305 U. S. 32 (1938) 8

Jackson v. Irving Trust Co., 311 U. S. 494 (1941) 8

San Francisco v. Itsell, 133 U. S. 65 (1890) 7

Sherrer v. Sherrer, 334 U. S. 343 (1948) 8

Sills v. Board of Ed. of Hawthorne, 42 N. J. 351, —— A. 2d —— (1964) 12

Texas v. New Jersey, et al. (No. 13 Original, 1961 Term) 12

Treinies v. Sunshine Mining Co., 308 U. S. 66, 309 U. S. 693, rehearing denied (1939) 8

Western Union Telegraph Co. v. Pennsylvania, 368 U. S. 71 (1961) 2-7, 9-12

Statutes Cited

New Jersey Custodial Escheat Law 11

N.J.S. 2A:37-3 3

N.J.S. 2A:37-29 3

28 U.S.C.:

1257(3) 1

Rule Cited

R.R. 4:62-2 4

Texts Cited

13 Cyclopedia of Federal Procedure (3rd Ed. 1952):

276, Sec. 57.180 7

PAGE

Stern and Gressman, Supreme Court Practice (3rd Ed. 1962):

p. 80 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 19

No.

AMERICAN CAN COMPANY, a New Jersey corporation,
Petitioner,

v.

STATE OF NEW JERSEY, by HUGO A. HILGENDORFF, JR., Attorney-At-Law specially designated by the Attorney General of the State of New Jersey,
Respondent.

BRIEF FOR RESPONDENT, STATE OF NEW JERSEY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Opinion Below

The opinion of the Supreme Court of New Jersey in this matter is reported in 42 N. J. 32, 198 A. 2d 753 (1964) Appendix B. of Petition.

Jurisdiction

Petitioner attempts to invoke the jurisdiction of this Court under 28 U.S.C. 1257(3). Jurisdiction is lacking

because the order sought to be reviewed does not involve the violation of any federal title, right, privilege or immunity of petitioners and does not contain any substantial federal question.

Questions Presented

1. Where a consent judgment and a contested judgment were entered and paid and defendant, long after time for review had passed, applied to the State Court to be relieved from the effect of said judgments and the Court denied said application on principles of *res judicata*, is a substantial federal question presented sufficient to justify a review by this Court on a writ of certiorari?

2. Where, prior to *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U. S. 71 (1961), in an action by the State of New Jersey for custody of unclaimed personal property which was not claimed by any other state a consent judgment for custody was entered and paid and thereafter this Court filed its opinion in *Western Union*, was defendant deprived of due process under the United States Constitution, when more than one year and ten months after the entry of said consent judgment the State Court denied its motion for an order declaring the said judgment void under the holding of *Western Union?*

3. Where, prior to *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U. S. 71 (1961), in an action by the State of New Jersey for custody of unclaimed personal property defendant alleged in its answer that the property was also claimed by another state and, after hearing, judgment was entered against defendant with the Court providing in the judgment that jurisdiction be retained for the purpose of granting appropriate relief on any claim which defendant may present against the State of New Jersey for reimbursement in regard to any double liability and defendant,

aware that *Western Union* was pending in this Court, did not appeal but paid the judgment and thereafter this Court filed its opinion in *Western Union*, was the defendant deprived of due process under the United States Constitution where, more than one year and one month after entry of said judgment the Superior Court denied its motion for an order declaring the said judgment void under the holding of *Western Union*, which order was affirmed by the State Supreme Court in an opinion which specifically noted that jurisdiction of the cause had been retained in order to reimburse defendant in the event it was ever subjected to double liability?

Statement of the Case

On December 21, 1959, the State of New Jersey, commenced an action under Article 3, Chapter 37, Title 2A of the New Jersey Statutes, N.J.S. 2A:37-29 *et seq.* against defendant, American Can Company, a New Jersey corporation. Plaintiff sought judgment of custody for safekeeping of certain unclaimed personal property in the custody or possession of the defendant.

Defendant answered, admitting possession of unclaimed items of personal property. On September 16, 1960, with the consent of defendant judgment was entered in favor of New Jersey for $37,801.66. This amount was admittedly not claimed by any other state. On December 16, 1960, to correct an inadvertence by an officer of defendant an order was entered amending the amount of the said judgment to $37,950.99. Said consent judgment was satisfied on January 3, 1961.

Defendant contested plaintiff's rights to unclaimed items of personal property aggregating $1,896.19 on the grounds that these items were also claimed by the State of California. A hearing was held on this issue and the Superior

Court entered judgment in favor of the State of New Jersey. The Court, informed that *Commonwealth* v. *Western Union Tel. Co.*, 400 Pa. 337, 162 A. 2d 617 (1960) was pending on appeal in the United States Supreme Court, considered withholding decision until that case was decided but concluded to decide the matter noting that the Pennsylvania case was an absolute escheat action and unlike the New Jersey case which was an action for custody. The Court further noted that if either party was dissatisfied with his determination, appeal could be taken and a dispositive rule obtained (A43a).

On June 16, 1961, judgment in favor of New Jersey for custody of the sum of $1,896.19 was entered. No appeal was taken from this judgment and it was paid in full. Both judgments concluded with a retention of jurisdiction for the purpose of granting reimbursement in the event the defendant is subject to double liability.

On December 4, 1961, the United States Supreme Court filed its opinion in *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U. S. 71 (1961) reversing Pennsylvania's judgment of escheat in *Commonwealth* v. *Western Union Tel. Co.*, *supra*. On July 17, 1962, more than one year and ten months after the entry of the first judgment on September 16, 1960, and more than one year and one month after the entry of the second judgment on June 16, 1961, the defendant filed a notice of motion under the Revised Rules governing the New Jersey courts, R.R. 4:62-2, seeking to be relieved of the judgments entered against it. The grounds set forth in the notice were (1) the judgment was void, (2) it was entered in violation of due process and the defendant's rights under the fourteenth amendment, and (3) for "other reasons justifying relief." After hearing the Superior Court denied the motion.

On appeal the Supreme Court of New Jersey affirmed, holding that *Western Union* would appear to have no bearing on the consent judgment entered in 1960, which judgment applied to property not claimed by any other state, nor would *Western Union* appear to have any effect on the validity of the 1961 judgment which, though it involved property claimed by two states, became final before the decision in *Western Union*, it was never appealed and was, therefore, subject to principles of *res judicata*. The Court noted that, occasionally instances may be found where *res judicata* has flexibly given way to counter policies deemed more important, but that the instant case has little or nothing in common with them and that the principles of *res judicata* were applicable. The Court noted further that jurisdiction of the cause had been expressly retained in order to afford defendant relief from any dual liability attributable to other claims over the property.

Defendant, American Can Company, now petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of New Jersey.

Summary of Argument

It is contended herein that the petition for writ of certiorari should be denied by this Court because petitioner has failed to establish the impairment of any substantial title, right, privilege, or immunity under the Federal Constitution or other federal law, and has failed to demonstrate that the order or underlying judgments for which review is sought involve any substantial federal questions. The actions below were predicated upon adequate and independent nonfederal grounds.

Specifically it is pointed out that the only judgment involving an alleged disputed claim is the judgment in the amount of $1,896.19 entered in 1961. The other judgment

in the sum of $37,801.66 involved property as to which there was no other claim asserted except that of the State of New Jersey and this judgment clearly is in no way affected by this Court's decision in *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U. S. 71 (1961).

The opinion of the New Jersey Supreme Court reported in 42 N. J. 32, 198 A. 2d 753 (1964) (App. B), discloses that petitioner's motion to reopen or vacate the judgment below was denied because petitioner had failed to take a timely appeal therefrom or to initiate any other timely procedure to review said judgment. The petitioner at all times knew of the pendency of the *Western Union* case. It was held, therefor, that the general principles of *res judicata* were applicable to preclude a belated attack on the judgment. The New Jersey Supreme Court in its opinion also held that State Court proceedings and judgment in no way involved a deprivation of due process of law since petitioner could always claim reimbursement in the event it was subjected to dual liability. Jurisdiction was expressly reserved to assure this protection and the New Jersey proceedings in no way precluded the assertion of claims by any other state in a court of proper jurisdiction.

ARGUMENT

POINT I

The Writ of Certiorari should be denied because the decision of the State Court was based upon general principles of *res judicata* which involve no substantial federal right or question.

At the outset it is to be emphasized that the only dispute in the record of this case is the judgment for $1,896.19.

As the record indicates there were two separate judgments entered against the defendant. The first judgment for $37,801.66 was entered with the consent of the defendant. This sum represented unclaimed personalty not claimed by any other state and this judgment could not be affected by any way by this Court's opinion in *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U. S. 71 (1961).

Defendant contested New Jersey's right to the sum of $1,896.19 on the grounds that the said amount was also claimed by the State of California. After hearing the Superior Court of New Jersey entered judgment against defendant. The Court, as well as the parties, was aware that *Western Union* was then pending in the United States Supreme Court. As the instant case was not on all fours with *Western Union*, the Court decided the matter noting that either of the parties could appeal from the Court's determination if they were dissatisfied with the judgment. It is, therefore, clear that the only dispute between the parties in this case was the right of New Jersey to the sum of $1,896.19, and defendant's right to review, if it had been timely taken, would be limited to this amount. No issue was raised nor did it exist as to the sum of $37,801.66 which was not claimed by any other state and judgment for which was consented to by the defendant.

The State Court denied petitioner's application to be relieved from the effect of the judgments on well established principles of *res judicata*. It has long been recognized that federal issues are not presented by questions decided by state courts on principles of general law such as *res judicata*. 13 *Cyclopedia of Federal Procedure*, 276 (3rd ed. 1952), 57.180; *Chouteau* v. *Gibson*, 111 U. S. 200 (1883); *San Francisco* v. *Itsell*, 133 U. S. 65 (1890); *Stern and Gressman, Supreme Court Practice*, p 80 (3rd ed. 1962).

Defendant argues on page 11 of its Petition that the New Jersey Supreme Court in applying the principles of *res judicata* failed to consider:

> "* * * that the rigid and doctrinair application of principles of finality of judgments would not always be a just one. * * *"

and that:

> "* * * Flexibility should be the touchstone in a case such as this where the judgment complained of was admittedly entered without due process."

The New Jersey Supreme Court held that principles of *res judicata* were applicable to the judgments entered in this case. In so holding the Court followed: *Chicot Co. Drainage District* v. *Baxter State*, 308 U. S. 371, rehearing denied, 309 U. S. 695 (1939); *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 309 U. S. 693, rehearing denied (1939); *Sherrer* v. *Sherrer*, 334 U. S. 343, 350 (1948); *Jackson* v. *Irving Trust Co.*, 311 U. S. 494, 503 (1941); *Davis* v. *Davis*, 305 U. S. 32 (1938); *Baldwin* v. *Iowa State Traveling Men's Ass'n*, 283 U. S. 522, 524 (1931).

In the New Jersey Supreme Court's opinion it was noted that the Court was not unmindful that *res judicata* has occasionally given way to counter policies deemed more important. On page 40 of 42 N. J. (P. 757 of 198 A. 2d) the Court stated:

> "* * * Despite the breadth of these expressions, occasional instances may be found where *res judicata* has flexibly given way to counter policies which were deemed more important and thus adequate to justify collateral attack upon the jurisdictional determination; they may be found collected in *Duke* v. *Durfee*, 308 F. 2d 209 (8 Cir. 1962), reversed 375 U. S. 106, 84 S. Ct.

242, 11 L. Ed. 2d 186 (1963), but examination readily discloses that they have little or nothing in common with the situation at hand.' Here the jurisdictional issue was fairly tried and determined adversely to the defendant which then deliberately chose not to seek further review though the availability of appeal and the pendency of *Western Union* were specifically called to its attention. Cf. *Angel* v. *Bullington*, 330 U. S. 183, 189-190, 67 S. Ct. 657, 91 L. Ed. 832, 836-837 (1946). The policies underlying the principles of *res judicata* are fully applicable and no significant countervailing policies have been brought to our attention. 'Cf. *Restatement, Judgments*, §10 (1942); *Restatement, Conflict of Laws*, §451(2) (Supp. 1948)."

This clearly indicates that the New Jersey Supreme Court was well aware of the attitude of this Court on the application of principles of *res judicata*.

POINT II

Petitioner has not been deprived of any federal constitutional right or due process of law.

In several places in its Petition defendant alludes to the judgment entered in this case as having been admittedly entered without due process. The word "admittedly" is loosely used for New Jersey has never conceded that any judgment was entered without due process. It is vigorously and strongly pointed out to this Court that both judgments entered in this case in the New Jersey court were entered with full due process.

The judgment for $37,950.99 was entered with the consent of the defendant and was for funds not claimed by any other state. Clearly *Western Union* has no applica-

tion whatsoever to this judgment and it was unquestionably entered with due process.

The judgment for $1,896.19 became final more than five months before *Western Union* was decided. Unlike *Western Union*, which was concerned with a judgment for escheat, the judgment in the instant case was for custody only. The property taken into custody does not become subject to escheat under the New Jersey law until two years after notice, that the property is held by the State of New Jersey, has been sent to the last known address of the person entitled and if said address was outside New Jersey to the attorney general of that state.

Both judgments entered in the instant case contained a reservation of jurisdiction to enable reimbursement to the defendant in the event of double liability.

The defendant was aware that *Western Union* was pending on appeal at the time the judgment for $1,896.19 was entered. It chose not to appeal from the judgment and was apparently satisfied with the protection from double liability provided by the reservations in the judgment. In view of all of these factors, it is evident that the judgments entered in this case were not entered without due process.

Due process, as this Court indicated in *Baldwin* v. *Iowa State Traveling Men's Ass'n*, 283 U. S. 522 (1931), does not grant to a party the "right to litigate the same question twice." This is apparently what the defendant sought to do in the instant case.

We respectfully point out to the Court that the question indicated as a specific question involved in the appeal and which is set out on page 9 of the Petition as follows:

> "Should a judgment obtained in violation of constitutional due process requirements and therefore void be declared a nullity?" (Certified Transcript of Record of Proceedings in Superior Court of New Jersey.)

is a reference to a question which defendant stated in its brief was involved in the appeal. The plaintiff did not agree with the defendant that such question was involved and submitted a counter-statement of questions involved.

Petitioner's assertion that the judgment of the Supreme Court of New Jersey "in essence retrospectively validates hundreds of judgments erroneously entered prior to this Court's decision in *Western Union Telegraph Co., supra*" is patently ill founded (Petition for Certiorari, page 9).

Any similar judgments previously entered under the New Jersey Custodial Escheat Law were valid when entered, have never been questioned and are not part of the record in this case, and it cannot be suggested that there validity is now open to question. *Cf. Chicot Co. Drainage District* v. *Baxter State Bank, supra.*

Petitioner also urges that the decision of the Supreme Court of New Jersey will establish a precedent if allowed to stand. The contested judgment for $1,896.19 entered by the Superior Court of New Jersey on June 16, 1961, became final more than five months before this Court filed its opinion in *Western Union*. Petitioner, aware that *Western Union* was pending, took no appeal from the judgment. It apparently was satisfied with the protective measures against double liability which the New Jersey court provided in the judgment. It is difficult to conceive how this judgment will serve as a precedent. Certainly there is nothing in the record which would intimate that any pending or prospective custody or escheat actions in the State of New Jersey against multi-state corporations would

be improperly determined because of the judgment below. There is no reason for this Court to assume that the courts of the State of New Jersey will fail to abide by the decisions rendered in *Western Union* and in the pending case of *Texas* v. *New Jersey, et al.* (No. 13 Original, 1961 Term). See, *e.g. Sills* v. *Board of Ed. of Hawthorne*, 42 N. J. 351; —— A. 2d —— (1964).

For the information of this Court it is respectfully pointed out in the supplemental appendix annexed hereto that it is the present policy of the State of New Jersey to delay the commencement of any new custody or escheat actions against multi-state corporations until *Texas* v. *New Jersey, et al.* is decided. In those cases where it is necessary to commence actions for custody or escheat (as where a corporation seeks to remove itself from the jurisdiction) as well as in all other actions which were pending at the time *Western Union* was decided consent orders have been entered staying all further proceedings until a decision is rendered by this Court in *Texas* v. *New Jersey, et al.*

CONCLUSION

For the reasons set forth herein it is respectfully urged that the judicial actions of the New Jersey courts which petitioner seeks to review by way of a writ of certiorari are predicated upon adequate and independent nonfederal grounds and do not involve any substantial claims of federal right or federal questions and that there has been no deprivation of due process or any other federal constitutional right and for the additional reasons set forth in the opinion of the New Jersey Supreme Court, it is respectfully urged that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

ARTHUR J. SILLS,
Attorney General of New Jersey,
Attorney for Respondent, The State of New Jersey.

CHARLES J. KEHOE,
Deputy Attorney General,
Of Counsel and on the Brief.

[APPENDIX FOLLOWS]

APPENDIX

Exhibit "A"

PENDING CASES FOR CUSTODY OR ESCHEAT
WHICH HAVE BEEN STAYED

Caption	*Docket No.*
State v. Waitt & Bond, Incorporated	C-205-61
State v. Westinghouse Electric Corp.	C-206-61
State v. Horn & Hardart Baking Co.	C-587-61
State v. American Tobacco Company	C-3133-60
State v. American Sugar Refining Corp.	C-185-61
State v. American Machine & Foundry Co.	C-3131-60
State v. Republic Steel Corporation	C-3101-60
State v. Eastman Kodak Company	C-3106-60
State v. Hoffman Beverage Company	C-1060-61
State v. United Fruit Company	C-423-61
State v. General Cable Corporation	C-484-61
State v. Francis I. DuPont & Co.	C-487-61
State v. American Steel Foundries	C-3040-60
State v. Campbell Soup Co.	C-3046-60
State v. Crucible Steel, Inc.	C-3047-60
State v. Jefferson Lake Sulphur Co.	C-2839-61
State v. U. S. Steel	C-3067-60
State v. Standard Oil Company	C-144-61
State v. United States Rubber Co.	C-2726-60
State v. Socony Mobil Oil Company	C-1928-60
State v. National Biscuit Co.	C-1927-60

Exhibit "B"

SAMPLE ORDER STAYING PENDING STATE COURT CUSTODY AND ESCHEAT ACTIONS
SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION—MERCER COUNTY
Docket No. C-3106-60

THE STATE OF NEW JERSEY, by ARTHUR J. SILLS, Attorney General of the State of New Jersey,

Plaintiff,

vs.

EASTMAN KODAK COMPANY, a corporation of New Jersey,

Defendant.

The parties hereto, the State of New Jersey and Eastman Kodak Company by their respective counsel, Hugo A. Hilgendorff, Jr., Esq., Attorney Specially Designated to Prosecute This Action for the State of New Jersey, and Messrs. Stryker, Tams & Dill for the defendant having made application to this Court and it appearing that the State of Texas has filed a petition in the United States Supreme Court for permission to file a Complaint against the State of New Jersey, the Commonwealth of Pennsylvania and the Sun Oil Company, a New Jersey corporation, to determine the right of the respective states to take personal property consisting of dividends, wages and other general cash obligations among other properties and the questions therein presented are similar to questions pre-

sented in this action, and it further appearing that time and expense will be saved by awaiting clarifying action by the United States Supreme Court in the above mentioned action and the parties hereto having given their consent to this Order as appears from the signature of counsel below, now then, it is on this 29th day of June, 1962

ORDERED that all further proceedings in this action be and the same hereby are stayed until to and including 30 days after the date on which the United States Supreme Court decides not to take jurisdiction of, or makes its determination in, the case of *State of Texas* v. *State of New Jersey et al.* or until the further order of this Court.

FRANK J. KINGFIELD
J.S.C.

Consent is given to the
making and entry of the
foregoing Order,

ARTHUR J. SILLS
Attorney General of the
State of New Jersey
By HUGO A. HILGENDORFF, Esq.
Attorney Specially Designated
to Prosecute This Action